Filed 4/6/04 P. v. Nguyen and Tran CA2/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HOA NGOC NGUYEN and JASON LEE TRAN, Defendants and Appellants.	B163694 (Los Angeles County Super. Ct. No. BA109976)
In re JASON LEE TRAN, on Habeas Corpus.	B168413

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph F. De Vanon, Judge. Judgments affirmed as modified; Tran's habeas corpus petition is denied.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant Hoa Ngoc Nguyen.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant Jason Lee Tran.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Scott A. Taryle, Deputy Attorney General, for Plaintiff and Respondent.

Defendants and appellants, Hoa Ngoc Nguyen and Jason Lee Tran, appeal from their sentences following their convictions, by court trial, for robbery, conspiracy to commit robbery, and false imprisonment, with arming, firearm use and gang enhancements (Pen. Code, §§ 211, 182/211, 236, 12022, 12022.5, 12022.53, 186.22).[1] Sentenced to state prison terms of 30 years (Nguyen) and 30 years, 4 months (Tran), the defendants' first appeal raised trial and sentencing errors. On February 5, 2002, in case No. B138507, we affirmed the judgments of conviction as modified and remanded to the trial court for resentencing. On remand, the trial court sentenced Nguyen to 29 years, and Tran to 28 years, 8 months. In their second appeal, defendants contend the trial court erred when it resentenced them. In a related habeas corpus petition, Tran contends he was denied effective assistance of both trial and appellate counsel.

The judgments are affirmed as modified; Tran's habeas corpus petition is denied.

BACKGROUND

Because this is an appeal from resentencing on remand after we heard defendants' original appeal, we will provide only such factual background as is needed to resolve the particular issues raised.

CONTENTIONS

1. The trial court improperly relied on the same sentencing factors to impose both an upper term and an enhancement on Nguyen.

2. The trial court improperly relied on the same sentencing factor to impose both an upper term and an enhancement on Tran.

---

[1] All further statutory references are to the Penal Code unless otherwise specified.

3. Tran's concurrent prison terms for three counts of false imprisonment were improper under section 654.

4. The trial court erred by staying, rather than striking, three of Tran's enhancements.

5. Tran received ineffective assistance of counsel at the resentencing hearing.

6. Tran received ineffective assistance of counsel during his first appeal.

DISCUSSION

1. *No improper dual use of sentencing factors as to Nguyen.*

In resentencing Nguyen, the trial court said it found "the following factors to be in aggravation. All the crimes involved here were crimes of premeditation and sophistication. The defendant was on probation at the time of the offenses involved in this case. [¶] I do believe that the crimes involved showed the threat of great bodily harm. I find that the victims were particularly vulnerable, especially those victims who were in their own home in the evening hours to be invaded by the defendant and his cohorts and . . . the crimes involved taking of great monetary value. [¶] In mitigation the defendant is youthful and had [a] very minimal record . . . [¶] With that in mind, [the trial court] set count 12 as the principal term . . . " The trial court chose the high term of nine years for count 12, added a 10-year firearm enhancement and then, with no additional statement of reasons, imposed mid-term consecutive sentences for counts 14 through 18.

Nguyen contends this constituted an impermissible dual use of sentencing factors, arguing the trial court improperly relied on the same sentencing factors both to justify the upper term on count 12 and to impose consecutive terms on counts 14 through 18. This claim is meritless.

Nguyen assumes the trial court was relying on the same aggravating factors to support both of its sentencing choices. However, that's not clear from the record. After first enumerating all the aggravating and mitigating factors, the trial court said, "[w]ith that in mind," and then proceeded to pronounce sentence. It would not be unreasonable to conclude the trial court intended some of the enumerated aggravating factors to

support the upper term and others to support consecutive sentencing, but merely failed to delineate which was which.

In any event, it is clear the trial court was strongly inclined to impose the highest sentence possible while complying with this court's directions on remand. The trial court articulated a sufficient number of aggravating factors to have *separately* supported both the upper term and consecutive sentencing.

" 'Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error." ' [Citation.] Only a single aggravating factor is required to impose the upper term [citation], and the same is true of the choice to impose a consecutive sentence [citation]. In this case, the court could have selected disparate facts from among those it recited to justify the imposition of both a consecutive sentence and the upper term, and on this record we discern no reasonable probability that it would not have done so. Resentencing is not required." (*People* v. *Osband* (1996) 13 Cal.4th 622, 728-729; see also *People* v. *Levesque* (1995) 35 Cal.App.4th 530, 548 ["A single factor is sufficient to support the trial court's decision, and any error in relying on additional factors is harmless."].)[2]

---

[2] Nguyen also asserts it was reasonably probable the trial court would not have imposed a consecutive term on count 18 because it had only imposed a concurrent term on that count at the first sentencing hearing. But this ignores the trial court's power to restructure a sentence in order to achieve the same aggregate sentence imposed before the case was remanded for resentencing. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1256 ["the trial judge's original sentencing choices did not constrain him or her from imposing any sentence permitted under the applicable statutes and rules on remand, subject only to the limitation that the aggregate prison term could not be increased[]"]; *People v. Castaneda* (1999) 75 Cal.App.4th 611, 614 ["A judge's subjective determination of the value of a case and the appropriate aggregate sentence, based on the judge's experiences with prior cases and the record in the defendant's case, cannot be ignored. A judge's subjective belief regarding the length of the sentence to be imposed is not improper as long as it is channeled by the guided discretion outlined in the myriad of statutory sentencing criteria."].)

2. *No improper dual use of sentencing factors as to Tran.*

Tran contends the trial court improperly used the same sentencing factor, use of a gun by a principal, both to support an aggravated base term and as the basis for an additional ten-year firearm enhancement under section 12022.53. This claim is meritless.

Count 1 involved the robbery of a Noodle Planet restaurant in Alhambra on January 17, 1999. Present at the time were an assistant manager and three other employees. One of the robbers had a handgun; the other, who apparently was Tran, had a knife. At the resentencing hearing, the trial court said one aggravating factor was that "the threat of great bodily harm [had] been significant[,]" and then it imposed both an aggravated term for the robbery and a firearm use by a principal enhancement.

Tran's claim depends on his assumption the trial court must have based the great bodily harm aggravating factor on the gun use. But this ignores the fact the use of a knife furnished an adequate basis for finding there had been a threat of great bodily harm.

Tran argues this analysis is wrong because "the sole threats of bodily harm by word or deed came through the use of the gun." He asserts it was the gunman who threatened the victims, whereas the robber with the knife said nothing during the entire incident. He asserts "there is no evidence that the knife man approached [the manager or] any robbery victim with [the knife] such that an injury might have been accidentally or intentionally inflicted."

Tran's assertions are inaccurate. The manager testified that, although only the gunman actually uttered a death threat, *both* perpetrators ordered the employees to get down on their stomachs, and the man with the knife menaced the victims by waving the knife back and forth. Moreover, two of the other three Noodle Planet employees testified the man with the knife ordered them to get on the floor. One employee testified the man with the knife was "keeping us down" on the floor. Hence, the trial record does not demonstrate there had to have been a dual use of sentencing factors.

3. *Tran's concurrent false imprisonment terms were proper*.

Tran contends the trial court erred by punishing him for both robbery (counts 5 through 7) and false imprisonment (counts 8 through 10) based on the second Noodle Planet holdup on January 30, 1999. He argues multiple punishment was barred by section 654 because the false imprisonments were committed with the same intent and objective as the robberies, that is, to gain control of the employees' personal property. This claim is meritless.

Tran acknowledges we already rejected this claim in his first appeal. As we said there: "Tran contends the trial evidence does not support the trial court's finding that the false imprisonments were 'separate and distinct incidents.' He argues that, although the money had already been removed from the restaurant safe before the three employees were tied up, their personal property was taken after they were tied up. However, the evidence also shows that, *after* the employees' personal property was taken, they were shut up inside the small room where the safe was located. The trial court could have reasonably found it was this final act, rather than the tying up, that constituted the false imprisonment. Thus, it was an offense committed after the robberies were complete, apparently to avoid detection."

When a defendant commits a crime in order to prevent detection of an earlier crime, the second crime is committed with a separate intent. (See *People v. Coleman* (1989) 48 Cal.3d 112, 162 [where defendant robbed victim, then killed bystander-witness, then stabbed robbery victim, it was proper to conclude that "defendant committed the assault with the intent and objective of preventing the victim from sounding the alarm about the murder, and that his intent and this objective were separate from, not incidental to, the robbery[]"].)

Here, the victims had turned over their personal property before they were shut into the safe room. Hence, it was reasonable to conclude the false imprisonments had been committed to facilitate the robbers' escape and consequently multiple punishment was proper. (See *People v. Foster* (1988) 201 Cal.App.3d 20, 27-28 [false imprisonment was not merely incidental to robbery where, after store employee "had turned over all the

money, the robbers forced her and two other victims . . . into the store cooler and blocked their exit by pushing a hand cart against the door[]"].)

Tran argues we should reconsider our prior decision in light of *People v. Chacon* (1995) 37 Cal.App.4th 52. He asserts *Chacon* supports the following reasoning: "Where, as here, an offense is committed for the purpose of evading detection or apprehension for another offense, the two offenses are committed pursuant to the same objective, and the subordinate term must be stayed." But *Chacon* says no such thing. The underlying offense in *Chacon* was itself an escape, from a California Youth Authority facility, and it was within this context that *Chacon* concluded: "The kidnap for ransom, extortion, and escape were part of an indivisible transaction having a single objective: escape. We conclude that section 654 requires a stay of the sentences for escape and extortion." (*Id.* at p. 66, fn. omitted.) As *Chacon* itself noted: "Had appellants effected the escape before the kidnapping and extortion, separate punishment would be appropriate. (E.g., *People v. Nick* (1985) 164 Cal.App.3d 141, 147 . . . [robbery committed after escape completed]; *People v. Bailey* (1974) 38 Cal.App.3d 693, 701 . . . [separate punishment for kidnapping and escape proper where escape perfected before kidnapping].)" (*Id.* at p. 66, fn. 7.)

Tran offers no valid reason for reconsidering our initial handling of this issue.

4. *Tran's stayed enhancements must be stricken*.

Tran contends the trial court erred when it imposed and stayed, on counts 1, 2 and 5, enhancements under sections 186.22(b)(1), 12022(a) and 12022(b). He asserts the trial court had no authority to impose those enhancements at all, and the People properly agree. (See § 12022.53, subds. (e)(2), (f).) We will order these enhancements vacated.

5. *Tran was not denied effective assistance of counsel at resentencing*.

Tran contends he was denied effective assistance of counsel at the resentencing hearing. This claim is meritless.

A claim of ineffective assistance of counsel has two components: " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel"

guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] [¶] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness.' [Citation.] To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391.)

Tran argues counsel on resentencing did nothing on his behalf and, therefore, his sentence must be vacated. He relies on the following language from *United States v. Cronic* (1984) 466 U.S. 648, 659: "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."

But although Tran insists defense counsel on remand did "absolutely nothing," his habeas corpus petition includes a letter from counsel contradicting this assertion. The letter says defense counsel reviewed Tran's file "regarding the re-sentencing after his initial sentence was overturned on appeal[,]" and that defense counsel attended an in-chambers conference at the trial court prior to the formal resentencing hearing. (HCPet letter exh. 6/13/03) The letter says the trial court subsequently sentenced Tran "to the term indicated during the [in-chambers] conference[.]" Presumably, some sort of presentation or argument was made during the in-chambers conference. Thus, we cannot agree with Tran that defense counsel's representation was so deficient it was tantamount to no representation at all.

Moreover, Tran fails to show any resulting prejudice. He complains defense counsel did not object to an error in the probation report regarding the number of counts on which Tran had been convicted. But this was a court trial, and Tran was sentenced by the same judge who convicted him. The People's resentencing memorandum correctly

enumerated the conviction counts. At resentencing, the trial court cited each conviction count while pronouncing sentence.

Tran argues a more competent attorney could have gotten him a much better sentence because the probation report on resentencing had recommended a substantial reduction in his prison term. Tran asserts the probation officer, who interviewed him specifically "for the purpose of assessing the authenticity of his remorse" had "found him 'credible and remorseful.' The judge, by contrast, was relying on his memory of a trial that occurred two years prior to the resentencing hearing. In this context, the value of the assistance of zealous counsel is immeasurable."

The record, however, indicates the probation report's recommendation of a substantial sentence reduction was problematic. The probation officer concluded Tran "was credible because he said nothing that could be identified as a lie or even a disingenuous statement. He seems remorseful because statements convey [an] understanding that his criminal behavior has turned his life into a nightmare, as well as shaming his family." But Tran either lied, or was at least disingenuous, when he told the probation officer "he had no weapon" during either Noddle Planet robbery.[3] And while Tran showed the probation officer he had plenty of self-pity for having committed these crimes and gotten a long prison sentence, he did not express any remorse for his victims.[4] Tran argues he had no way to know "how the robberies affected the victims' lives. There

---

[3] When he confessed to these crimes, Tran told police he used a knife during both Noodle Planet robberies. He said that in the first robbery "he did not have a weapon initially, he had only brought some rope with him to tie the victims up, but once the robbery started he picked up a knife from the kitchen in the restaurant." He told police that during the second Noodle Planet robbery "[h]e was armed . . . with a knife, a locking blade knife."

[4] Tran told the probation officer "he thinks everyday how he has messed up his life by committing the crimes in this case[.] 'I shamed my family by getting into this trouble, I've really screwed up my own life.' " Tran "said when he ultimately gets released from prison, he will never break the law again, 'I'm not gonna gamble with my life, my freedom like I did before.' He says he is very mad at himself for committing these crimes, 'At the time I didn't face the real world, I didn't realize how stupid I was, I don't want to waste my life in jail.' "

were no victims' statements in the record, and there was no indication [he] had any contact with the victims after the robberies." But that's just the point; Tran demonstrated he could not empathize with his terrorized victims.

Tran complains defense counsel should have objected when the trial court imposed a previously-stayed firearm enhancement on count 2. But it is not improper for a trial court, on resentencing, to consider the appropriateness of the total, aggregate sentence when making discretionary choices about the individual counts and enhancements included within that sentence. (See *People v. Burbine, supra,* 106 Cal.App.4th at p. 1258 [after one count stricken on appeal, trial court validly imposed upper term on another count to reach same aggregate sentence]; *People v. Castaneda*, *supra,* 75 Cal.App.4th at pp. 613-615 [on remand, trial court properly struck invalid enhancement while increasing previously-imposed middle base term to the upper term]; *People v. Calderon* (1993) 20 Cal.App.4th 82, 87-88 [after one count stricken on appeal, trial court validly imposed consecutive term on previously stayed count to reach same aggregate total].)

Tran argues defense counsel was remiss for not objecting to the trial court's failure to state reasons for imposing consecutive sentences on counts 2 through 7, and on count 38. True, the trial court did not delineate which of the aggravating factors pertained to which of its discretionary sentencing choices, and a timely objection likely would have resulted in a clearer record in that regard. But there is practically no likelihood an objection would have resulted in a lower sentence because the trial court clearly believed there were sufficient aggravating circumstances to support both the upper term and consecutive sentencing.

Tran has failed to demonstrate ineffective assistance of counsel on resentencing.

6. *Tran was not denied effective assistance of appellate counsel.*

In his related habeas corpus petition, Tran contends he was denied the effective assistance of appellate counsel during his first appeal. This claim is meritless.

Tran complains appellate counsel failed to argue there was insufficient evidence to support the criminal street gang enhancement (§ 186.22, subd. (b)(1)), because the record

did not establish his robberies were "committed for the benefit of, at the direction of, or in association with" the Hillside Gang, of which he was admittedly a member.[5]

But Tran incorrectly focuses solely on whether there was evidence proving the crimes had been committed for the benefit of the gang, while ignoring the statute's alternative definition of a crime committed "in association with any criminal street gang." (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ["the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members" because "there was evidence that defendant intended to commit robberies, that he intended to commit them in association with Flores and Moreno, and that he knew that Flores and Moreno were members of his gang"].)

There was much evidence in the record showing Tran had committed the robberies in association with his gang. When Tran confessed, he told Detective Lee he had "been a member of the Hillside gang for the last two months[,]" that he would only talk about his personal role in the crimes because he "didn't want to be known as a rat to the rest of the gang members[,]" and that "he got involved in committing . . . crimes when he became a member of the gang."

---

5 Section 186.22, subdivision (b)(1), imposes an enhanced sentence on "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]"

DISPOSITION

The section 186.22(b)(1), 12022(a) and 12022(b), enhancements imposed on Tran in connection with counts 1, 2 and 5, are hereby vacated. The trial court is directed to prepare an amended abstract of judgment reflecting this modification and forward it to the Department of Corrections. In all other respects, the judgments are affirmed. Tran's habeas corpus petition is denied.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KLEIN, P.J.

We concur:

CROSKEY, J.

KITCHING, J.